No. 15613

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

ERNEST NELSON MURRAY and CHARLOTTE AGNES MURRAY,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF.

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Statement of Jurisdiction.

On March 15, 1956, the Grand Jury for the Southern District of California returned an Indictment against the defendants, Ernest Murray, Charlotte Murray, Richard Schrier and Frank McCormick, naming as unindicted co-conspirators, Marion Glenn Goodrich, Shirley Schrier, Jesse Gonzales and Roy Lee. [Tr. of R. 1.][1]

The first Count of the Indictment charged that all the defendants conspired to smuggle psittacine birds from Mexico into the United States. The second Count of the Indictment charged that on February 1, 1956, all the defendants smuggled 42 psittacine birds into the United

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[1]Tr. of R. refers to the Clerk's Transcript of Record. R. T. refers to the Reporter's Transcript of Proceedings.

States from Mexico, in violation of 18 U. S. C., Section 545. Count Three charged that on or about February 1, 1956, all the defendants received, concealed and facilitated the transportation of said 42 birds. Count Four charged that on February 16, 1956, the defendants Ernest and Charlotte Murray smuggled 17 birds from Mexico to the United States. Count Five charged that on February 16, 1956, the defendants Murray received, concealed and facilitated the transportation of said 17 birds. (*Ibid.*)

The defendant Schrier entered a plea of guilty to all Counts of the Indictment, while the defendant McCormick pleaded guilty to a different charge in an Information, the Indictment being dismissed as to him. [R. T. 170-171.]

Jury trial began on October 2, 1956, as to the Murrays, and was concluded on October 5, 1956, by a verdict of guilty on all Counts as to each of the two defendants. [Tr. of R. 19.]

On October 15, 1956, the District Court sentenced Ernest Murray to two years' imprisonment on each of the Counts Two and Three, to run concurrently, and suspended imposition of sentence on Count One of the Indictment. [Tr. of R. 25.] Imposition of sentence as to Charlotte Murray was suspended. [Tr. of R. 26.] A timely Notice of Appeal was filed on October 18, 1956, by both defendants. [Tr. of R. 31.]

District Court had jurisdiction of the action under the provisions of U. S. C., Title 18, Sections 371, 545.

This Court has jurisdiction under the provisions of U. S. C., Title 28, Section 1291.

Statement of the Case.

Richard Carl Schrier is a drill operator who, as a sideline, had made three trips to Tijuana to smuggle psittacine birds prior to meeting appellant Ernest Murray. [R. T. 13.] Murray contacted him some time in December, 1956 [R. T. 155], and Schrier went to Murray's aviary in Whittier, California, to sell him some psittacines. [R. T. 4, 7, 11.] They met and conversed [R. T. 7] and Murray asked Schrier to obtain some Panama parrots for him. [R. T. 11-12.] This Schrier did the next day, after smuggling them from Mexico, whereupon he then sold them to Murray. [R. T. 14-15.] Upon the occasion of the sale of the Panamas, Murray asked Schrier if he would like to work for him, by smuggling psittacines from Mexico for $150 a trip. [R. T. 8, 21.] This proposition was again broached to Schrier at his house the next day, whereupon he accepted. [R. T. 20, 135.]

Ernest Murray then made arrangements with a bird dealer in Tijuana, Jesse Gonzales, to have Schrier pick up birds on Murray's account. [R. T. 30-31, 121-122, 126.] Richard, and his wife Shirley Schrier, then made approximately 17 trips to Mexico for psittacine birds, being successful in their smuggling operations six or seven times. [R. T. 24.] On the six or seven occasions, Murray would inform the Schriers as to the type of birds desired and would give the Schriers money which they would give to Gonzales. The Schriers would obtain birds from Gonzales in Tijuana, smuggle them across the border and then take them to the Murrays' aviary in Whittier. [R. T. 24-27, 139.] On one occasion, Mrs. Murray advised the Schriers as to the best type of birds to buy. [R. T. 32-33, 138.]

On February 1, 1956, Schrier and his father-in-law, Frank McCormick, were arrested in Oceanside, California, and jailed for smuggling 41 psittacines. [R. T. 35-36.] Murray made arrangements with a San Diego bail bondsman Vic Buono[2] and advised Schrier to keep quiet. [R. T. 80, 142-143.]

Shirley Schrier and Marion Glenn Goodrich, a nearby neighbor of the Schriers, visited Richard Schrier in the San Diego jail a few days later, and upon their return to Long Beach, noticed a roadblock along the highway. [R. T. 72.] They then went to advise Murray about this, as he had a man named Roy Lee engaged in smuggling another load of birds from Mexico at that time. [R. T. 72-73.] This was done, and Goodrich later asked whether he might be able to take Schrier's place in Murray's "bird business." [R. T. 76.] Murray agreed that he could and advised him as to how to conduct a bird smuggling operation. [R. T. 77.] Mrs. Murray relieved his mind about being caught by stating:

> "We have been in this business 18 years . . . We used to run birds seven days a week and we never got caught once in 10 years."[3] [R. T. 78.]

Goodrich, Mrs. Schrier and the appellants had other conversations. [R. T. 143.] After one conversation wherein Mrs. Murray intimated that Mr. Schrier might be in danger if he talked to Customs agents, Goodrich and Mrs. Schrier went to the Customs Agency with their information. [R. T. 81-82, 144.] Subsequently, the two informants held other conversations with Ernest Murray,

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[2]For a description of Buono's activities in bird smuggling, see *Duke v. United States,* ..... F. 2d ..... (C. A. 9, 1957).

[3]Not quite true. See *Murray v. United States,* 217 F. 2d 583 (C. A. 9, 1954).

including one which was recorded. [R. T. 82-83, 144; Ex. 1; R. T. 115, 150, 175.] Acting under directions of Customs agents, Goodrich and Mrs. Schrier took money from Murray, purchased psittacine birds in Mexico, and brought them back to Long Beach, where the Murrays took delivery, whereupon they were arrested. [R. T. 86-90, 239.]

Argument.

I.

Appellants Were Properly Convicted of Felonies.

Appellants complain that they were improperly subjected to the felony penalties of 18 U. S. C., Sections 371 and 545, for having conspired to smuggle and for having smuggled psittacine birds into the United States. It is argued that 42 C. F. R. 71.152(b) specifically regulates the importation of psittacines, and that punishment for a violation of that regulation is provided solely by 42 U. S. C., Section 271(a). Therefore, appellants contend that they should have been prosecuted and convicted only under the misdemeanor provisions found in 42 U. S. C., Section 271(a).

This is not a new contention for Mr. Murray, he having raised it before this Court in *Murray v. United States,* 217 F. 2d 583 (C. A. 9, 1954). The contention was rejected in that case as well as in *Steiner v. United States,* 229 F. 2d 745 (C. A. 9, 1956), cert. den., 351 U. S. 953. However, appellants urge that this point be reconsidered in light of *Berra v. United States,* 351 U. S. 131 (1956). This request was fulfilled in *Duke v. United States,* ..... F. 2d ..... (C. A. 9, 1957), wherein it was stated:

> "The case of Berra vs. United States, 351 U. S. 131, has no pertinency upon this point."

The *Duke* opinion contains a lucid analysis of the law applicable to psittacine bird smuggling, and is more than sufficient authority for the proposition that appellants were properly charged and convicted under 18 U. S. C., Sections 371 and 545.

II.

Co-conspirators' Testimony Was Properly Admitted.

Appellants next contend that testimony of various Government witnesses was improperly admitted. At the outset, it should be noted that Rule 18(2)(d) of this Court has not been followed with reference to this point, as neither the grounds urged at the trial for the objection nor the full substance of the admitted evidence has been quoted. Further, the requirement as to referring to the page of the transcript where the objections and the admitted evidence may be found has not been fully complied with. *Cf. Lee v. United States,* 238 F. 2d 341, 344 (C. A. 9, 1956).

As best as can be determined, however, appellants' contentions appear to be (1) that the testimony of the witnesses as to events happening after February 1, 1956 (the date the trial court instructed the jury the conspiracy ended), constituted "a narration of alleged past events, alleged admissions and declarations of alleged co-conspirators"; and (2) that since "all of Schrier's testimony (and that of his wife's) was given subsequent to the termination of the alleged conspiracy . . . these statements constitute extra judicial admissions for the purpose of establishing the elements of the alleged offenses."

Appellants' argument discloses a misunderstanding of terms such as "declarations," "admissions" and "extra-judicial." Where B, the co-conspirator of A, makes a statement to C during the course and in furtherance of a conspiracy, this statement, or "declaration," is binding upon A, and C may testify as to such declaration.

Lutwak v. United States, 344 U. S. 604, 617 (1953);

Krulewitch v. United States, 336 U. S. 440, 443 (1949);

Wolcher v. United States, 233 F. 2d 748, 751 (C. A. 9, 1956).

On the other hand, where B confesses to C the details of the conspiracy after his arrest, C may not testify as to such admission in the trial against A, since the courts rightly reason that B's statement was not made during or in furtherance of the conspiracy.

Krulewitch v. United States, 336 U. S. 440, 444 (1949);

Fiswick v. United States, 329 U. S. 211, 217 (1946);

Yokely v. United States, 237 F. 2d 455 (C. A. 9, 1956).

If Customs agents in the instant case had testified as to what the co-conspirators had told them concerning the Murrays, the point appellants advance might be in issue. However, this was not done. In other words, C did not testify below as to what B said about A. Instead, it was B (the co-conspirators) who testified as to their activities and conversations with Murray. We know of no rule of law which would forbid the co-conspirators Richard Schrier, Shirley Schrier, Marion Goodrich, and Jesse Gonzales from testifying as to the admissions appellants di-

rectly made to them. As was stated in *Smith v. United States,* 224 F. 2d 58, 60 (C. A. 5, 1955):

> "Appellant, citing Fiswick v. United States, 329 U. S. 211, 67 S. Ct. 224, 91 L. Ed. 196, and Krulewitch v. United States, 336 U. S. 440, 69 S. Ct. 716, 93 L. Ed. 790, apparently contends that a conspirator cannot testify against his co-conspirator, at least as to matters relating to the conspiracy. On just what basis this novel theory rests is difficult to divine. Certainly Fiswick and Krulewitch do not support it. Those cases merely restate the general principles of proof applicable to conspiracy. They stand for the principle that statements made by a conspirator during the conspiracy, in furtherance of the conspiracy, are admissible in evidence against all conspirators. Statements or confessions of one conspirator made after the conspiracy is ended are not admissible evidence against the other conspirators. *But this is not to say that a conspirator is incompetent to take the stand during the trial of the conspiracy charges and testify as to the activities of the various defendants on trial during the conspiracy.* See On Lee v. United States, 343 U. S. 747, 757, 72 S. Ct. 967, 96 L. Ed. 1270." (Emphasis added.)

Appellants also urge, that the testimony of Richard and Shirley Schrier constitute "extra-judicial admissions." How sworn testimony in open court by witnesses subject to cross-examination can constitute extra-judicial admissions is never fully explained. In similar vein, appellants complain that the Schriers' testimony was given subsequent to the termination of the conspiracy. Why this is important is equally mystifying. Appellants evidently desire a rule in criminal cases to the effect that the prosecution's testimony must be given during the actual commission of the crime charged. Their desires should not be confused, however, with the state of the law.

III.

There Being No Evidence of Entrapment, It Was Proper Not to Instruct the Jury Thereon.

The final point on appeal is that the trial court erred by not granting an instruction on entrapment.[4] Rule 18(2)(d) has not been complied with by appellants with respect to this point, as neither the refused instruction nor the grounds of the objection urged at the trial have been set out *totidem verbis*. Accordingly it would seem that this point need not be considered.

> *Lee v. United States,* 238 F. 2d 341, 344 (C. A. 9, 1956) (and see cases cited at footnote 15 therein).

Should the Court desire to consider this point, its lack of substance is readily apparent. Appellants' brief is replete with conclusions such as "during the trial, it developed that strong evidence of entrapment by the Government existed" (Appellants' Br. p. 3); "it was planned to entrap the Murrays" (Appellants' Br. p. 20); "Goodrich . . . along with others, set out to entrap the Murrays" (Appellants' Br. p. 13); and "Marion Glenn Goodrich . . . Shirley Schrier, . . . and one Jesse Gonzales, undertook to entrap the Murrays." (Appellants' Br. p. 4; see also pp. 6 and 21.) However, no reference is made to the record where the support for such conclusionary assertions can be found (this being in violation of Rule 18(2)(e)), but the lack of reference is understandable. For example, let us look at appellants' declaration that Jesse Gonzales, together with others, set out to entrap the Murrays.

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[4]The record shows that appellants objected to the omission of an instruction, but does not disclose what the instruction concerned. [R. T. 270-271; see also R. T. 217, lines 5-10.]

Gonzales met Murray in the first few days of January, 1956, and never saw him after that. [R. T. 125-126.] He sold psittacine birds to Richard Schrier, pursuant to an arrangement with Murray, but never sold birds to Shirley Schrier or Marion Goodrich, and indeed, never saw Goodrich before the trial. [R. T. 124-125.] Since even appellants do not contend that the alleged plan to entrap the Murrays did not originate until after February 1, 1956 (the date of Richard Schrier's arrest), it is difficult to determine how Gonzales could have been involved in the plan, since he sold birds only to Richard Schrier and only on or before February 1, 1956. Therefore, it would be interesting to know in more detail appellants' basis for contending that Gonzales set out to entrap the Murrays.

In order for entrapment to exist, the criminal design must originate, not with the accused, but in the mind of the government officers; only when an accused is lured into the commission of a criminal act by persuasion, deceitful representation, or inducement, is the government estopped from prosecution.

> *Sherman v. United States,* 241 F. 2d 329, 332 (C. A. 9, 1957);
>
> *Trice v. United States,* 211 F. 2d 513, 518 (C. A. 9, 1954).

Bearing this definition in mind, the evidence should be examined for any sign that appellants were lured into committing a crime by illegal means. All that can be shown on this matter is that Marion Goodrich asked Ernest Murray if he could work for Murray in the bird smuggling business. [R. T. 76.] Murray agreed, and he and Mrs. Murray gave Goodrich and Shirley Schrier instructions as to how to operate. [R. T. 77-78.] Be-

fore Goodrich and Shirley Schrier went to the Customs agents, these facts had happened:

1. Murray had hired Richard Schrier, at $150 a trip, to smuggle psittacine birds from Mexico, and seven successful trips had been made. [R. T. 20-24.]

2. Immediately after Richard Schrier's arrest, Murray had another person by the name of Roy Lee attempt to smuggle psittacines. [R. T. 73-74.]

3. Mrs. Murray had stated that they had been in the bird smuggling business for 18 years, and further, that "We used to run birds seven days a week and we never got caught once in 10 years." [R. T. 78.]

After learning of the Murrays' implication, Custom agents instructed Goodrich and Mrs. Schrier as to certain matters, including the use of a Miniphone to record conversations of Murray, which were introduced into evidence. [Ex. 1; R. T. 115, 150, 175.] With the permission of Customs agents, Goodrich and Mrs. Schrier bought psittacine birds with appellants' money in Mexico and brought the birds back to Long Beach, where the Murrays took delivery. [R. T. 87-91.]

Nowhere does the record disclose that the criminal design to smuggle psittacines was put into the Murrays' minds by anyone except themselves. The cross-examination of the government undercover agents did not show illegal entrapment, and the Murrays themselves offered no evidence on this point. Thus the facts provide no basis for an instruction on entrapment. Only where the evidence on entrapment is conflicting should the jury be instructed on this subject.

Sherman v. United States, 241 F. 2d 329, 333 (C. A. 9, 1957);

Lufty v. United States, 198 F. 2d 760 (C. A. 9, 1952).

Where there is no such evidence, it is not proper to instruct the jury on entrapment.

United States v. Pisano, 193 F. 2d 355, 361 (C. A. 7, 1951);

United States v. Markham, 191 F. 2d 936, 937 (C. A. 7, 1951);

Hall v. United States, 46 F. 2d 461 (C. A. 4, 1931);

Swallum v. United States, 39 F. 2d 390, 393 (C. A. 8, 1930);

Kendjerski v. United States, 9 F. 2d 909, 910 (C. A. 8, 1926).

Consequently, the trial court correctly refused to instruct the jury on a question as to which there was no evidence.

Conclusion.

There being no error in the trial, the judgments of the District Court should be affirmed.

Respectfully submitted,

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